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IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. ———

HARLAN BLACKBURN,

Petitioner,

vs

STATE OF FLORIDA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Harlan Blackburn, the petitioner herein, prays that a writ of certiorari be issued to review the final judgment and decree of the Supreme Court of the State of Florida entered in Case No. 26218 in that court, entitled, Harlan Blackburn, Appellant vs. State of Florida, Appellee, affirming the judgment and sentence of the Criminal Court of Record in and for Polk County, Florida rendered on January 4, 1954. The jury returned a

verdict of guilty under Counts 1, 2 and 3 of the five counts submitted to them. The trial judge, under the first count, which charged that petitioner did unlawfully set up, promote and conduct a lottery for money commonly known as Cuba and bolita, sentenced petitioner to be confined in the State prison of Florida at hard labor for a term of five (5) years which was the maximum provided by statute, and to pay one-ninth of the accrued costs, and in default of payment thereof to sixty (60) days at hard labor in the County Jail of Polk County, Florida. (R. Vol. IX, p. 1687)

OPINIONS BELOW

The judgment and sentence of the Criminal Court of Record in and for Polk County, Florida, has not been published in any official or unofficial report, but appears in Volume IX, page 1687, of the Record.

The opinion of the Supreme Court of Florida appears in APPENDIX "A", page 21-26. and the denial of rehearing by the Supreme Court of Florida appears in Appendix "A", page 41, said opinion is reported in case of *Blackburn vs. State,* 83 So. 2d 694.

JURISDICTION

The opinion, judgment and decree of the Supreme Court of Florida was rendered and entered on June 3, 1955. (Appendix "A", p. 21)

Timely application for rehearing was denied on November 1, 1955. (Appendix "A", p. 41)

On application of petitioner, the Chief Justice of the Supreme Court of Florida, on the 3rd day of November, 1955, granted a stay of mandate to enable petitioner to apply for a writ of certiorari to this Honorable Court, said stay being for 90 days. (Appendix "A", p. 49)

The jurisdiction of this court is invoked under *Title 28, United States Code, Section 1257 (3)*, which provides in part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * * or statutes of * * * the United States."

The following cases are believed to sustain the jurisdiction of this court:

New York ex rel Bryant v. Zimmerman, 278 U. S. 63, 67, and cases cited;

Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166, U. S. 226 at 231, 232.

The Supreme Court of the State of Florida is the highest court of the State.

QUESTIONS PRESENTED FOR REVIEW

Question No. 1

Does the due process clause of the Fourteenth Amendment to the Constitution of the United States protect petitioner from prosecution under a State court information in which each of five counts first charges five persons, including petitioner, with violation of a section of the Florida lottery statute, the charge concluding, "against the peace and dignity of the State of Florida;" and the same count next charges one or more other persons with a different violation of the same section, the charge concluding in the same fashion, and, the same count then charges one or more other persons with a different violation of the same section with the same conclusion, there being no allegation of conspiracy nor of concert of action nor participation by petitioner with respect to the different offenses and the different persons charged?

Question No. 2

Did the Supreme Court of Florida, by its failure to reverse the judgment and sentence of the trial court because that court denied petitioner's motion and renewed motion for change of venue, thereby deny petitioner due process of law guaranteed to him by the Fourteenth Amendment to the United States Constitution thereby denying petitioner his right to be tried under a charge fairly made and fairly tried in a public tribunal free of prejudice, passion and excitement?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the Fourteenth Amendment, which, in part, provides:

> "* * * nor, shall any state deprive any person of life, liberty, or property, without due process of law." (Excerpt)
>
> *United States Constitution, Amendment XIV.*

The Florida lottery statute involved is: *Section 849.09, F. S., as amended by Chapter 26765, Section 1, Laws of Florida 1951, F. S. A. Sec. 849.09.* (Appendix "B", p. 51-53)

The Florida change of venue statute involved is: *Section 53.03, F. S A.*, which is made applicable to Criminal Courts of Record of Florida by *Section 911.02(2), F. S. A.* (Appendix "B", p. 54)

STATEMENT OF THE CASE

When Harlan Blackburn, petitioner herein, was forced on trial with seven others in December, 1953, in the Criminal Court of Record in and for Polk County, Florida under the felony charges in a six count information naming twenty-four defendants, he had already been convicted in a trial in the same State court and had been sentenced on April 27, 1953 by the same judge under an information charging a conspiracy to commit the same felony (R. Vol. I, p. 36). His appeal from that conviction was then pending. (R. Vol. I, p. 16).

Harlan Blackburn had been the object of tremendous newspaper publicity relative to the transactions with which he was charged. Between October 10, 1951

and September 30, 1953 approximately ninety-seven different newspaper articles had been published about him in papers with wide circulation in Polk County, Florida. Ten of these articles called petitioner "Kingpin" or "Brains of Lottery Gang;" 12 named him as "Kingpin of Rackets;" 13 described him as "Notorious Kingpin of Gambling Rackets;" 9 called him "Orlando Racketeer;" 13 called him "Bolita Kingpin;" 6 called him "Head Man of Ring;" 3 called him "Boss of a Three-County Ring;" 3 the "Head of Operations;" and 3 others "Bolita Chieftain" and 2 called him "Gambling Overlord."

In addition to these, he was called "Ex-Convict," "Orlando No. 1 Badboy," "Boss of Gambling," "Kingpin of Orlando Bolita," "Bolita Big Shot," "Freewheeling Kingpin," "Prince of Big Bolita Province," "Orlando Gambler," "Bolita Celebrity," "Top Lottery Suspect," "Big Gun of Lottery Racket," "Top Level Suspect," and "Overlord of Bolita" at least once.

The verified venue motion alleged that the people of Polk County had been saturated with continuous sensational news articles picturing him as one of the most dangerous criminals preying upon the working people of Polk County through the operation of one of the most diabolical gangs infesting society, causing him to be looked upon generally by the people of Polk County as something loathsome and unholy and that a mountain of prejudice had been created in the minds of the people of Polk County against him, so that he had been rendered "so odious to the inhabitants of said Polk County that it would be a matter of impossibility for him to receive a fair and impartial trial in said county." (R. Vol. I, pp. 169, 171) (Three supporting affidavits, R. Vol. I, pp. 172-177).

This newspaper publicity appears in Exhibit "A" to Harlan Blackburn's motion for a change of venue (R. Vol. I, p. 166, separately certified).

Petitioner's motion also set up the fact that he and the charges against him had been made a political football in the race for sheriff of Polk County, and that a candidate generated and caused talk and gossip all over Polk County, although without basis in fact, that petitioner was friendly with one of the candidates for said office and that he was a dangerous criminal. That said charges became the subject of talks before some civic organizations. (R. Vol. I, pp. 167-168)

The prosecution did not deny the fact that petitioner had been rendered odious (R. Vol. I, pp. 178-181), the ground relied upon under the Florida statute, nor did the State traverse or deny any of the facts alleged and established, but the counter-affidavits submitted by the prosecution all denied the existence of a different ground for change of venue, not relied on and only denied (insofar as petitioner's motion was concerned) the conclusion drawn that it was a matter of impossibility for him to receive a fair and impartial trial in Polk County (R. Vol. I, p. 180).

Examination of the jurors on voir dire disclosed that a large number thereof had read of, and/or heard discussed, and/or had discussed the case or cases against petitioner. Twenty-six of said jurors were excused for having fixed opinions about petitioner's guilt or innocence in said cause. *(R. Vol. II, pp. 210, 231-2, 233, 235, 238, 239, 281, 296, 304, 305, 306, 320, 322, 328, 348, 352, 354, 356, 399, 409, 410, 411, 413, 414, and 417).*

After petitioner exhausted his peremptory challenges, and six jurors were in the box, petitioner duly renewed his motion for change of venue and the court denied said renewal (R. Vol. III, p. 439).

The six jurors finally forced upon Petitioner to try said cause were, (1) Mr. Kirkland, who had heard the case discussed in the last two days prior to his examination on voir dire (R. *Vol. II, pp. 387, 395);* (2) Mr. Rahrar, who had both read of the case and heard it discussed (R. *Vol. II, p. 360);* (3) Mr. Bissitt, who had both read of the case and heard it discussed (R. *Vol. II, p. 418);* (4) Mr. Hilton, who had read of the case (R. *Vol. II, p. 415);* (5) Mr. Mercer, who had read of and heard the case discussed (R. *Vol. II, p. 419)* and (6) Mr. Gay, who had read of and heard the case discussed (R. *Vol. II, p. 417).*

The record contains some 1767 pages of pleadings, motions, arguments, evidence, objections to evidence, charges to the jury, etc. The only question presented to this Court involving any factual matters is the one on change of venue. With that exception, we have not attempted to condense any factual matters adduced in the court below.

FEDERAL QUESTIONS IN THE COURTS BELOW

A. In The Trial Court

Petitioner filed a motion to quash the information setting up, among other things, the misjoinder of both offenses and parties defendant (R. Vol. I, pp. 14-28 at 26).

The protection of the Fourteenth Amendment is expressly invoked in ground 31 of the motion for new trial which reads as follows:

> "31. Because this defendant was denied a fair and impartial trial, as guaranteed by Sections 11 & 12 of the Bill of Rights to the Florida Constitution, as well as due process as guaranteed and protected by the Fourteenth Amendment of the Federal Constitution, through and by denial of Motion for Change of Venue, as well as denial of Motion for Severance and also by the admission in evidence of an enormous mass of incompetent, hearsay testimony, as well as through the forcing of this defendant to trial under a dragnet information charging separate, independent offenses at the same time and with other persons also charged with separate, independent offenses." (R. Vol. IX, p. 1654).

It is to be noted that this ground invokes federal protection, both as to the motion for change of venue, the motion for severance and the motion to quash.

Ground 40 of the motion for new trial invokes the protection of the Fourteenth Amendment as against the denial of petitioner's renewed motion for change of venue:

> "40. It became and was apparent that it was impossible to secure a jury who had not read or heard discussed, and talked about the case against this defendant, and this defendant having exhausted all of his peremptory challenges, the Court erred in overruling and denying defendant's renewed motion "For change of venue, and such ruling forced this defendant to trial under said conditions, denying to him a fair and impartial trial as guaranteed by Sections 11 & 12 of the Declaration of Rights under the Florida Constitution, as well as due process guaranteed to him by the Fourteenth Amendment to the Federal Constitution." (R. Vol. IX, p. 1657).

B. In The Supreme Court of Florida

Petitioner continued to press the federal questions on appeal by his formal assignments of error. The pertinent assignments are:

> "1. The trial court erred in the entry of order overruling and denying motion for change of venue filed by defendant." (R. Vol. IX, p. 1721).
>
> "2. The trial court erred in overruling and denying motion of this defendant whereby he renewed his motion for change of venue after he had exhausted all of his peremptory challenges and before the jury was sworn." (R. Vol. IX, p. 1721).
>
> "5. The trial court erred in overruling and denying motion for severance filed by this defendant, respectively upon all of the grounds of said motion stated." (R. Vol. IX, p. 1722).

Assignment 34 reads as follows:

> "34. The trial court erred in overruling and denying motion for new trial filed by this defendant, respectively upon all of the grounds of said motion stated." (R. Vol. IX, pp. 1735, 1736).

That the Supreme Court of Florida passed upon all the federal questions raised is made clear by the last paragraph of the opinion. It reads:

> "We have considered all other assignments of error and are not persuaded that the trial court committed reversible error in entering the judgment and sentence appealed from." (Appendix "A", p. 26).

That the Supreme Court of Florida passed upon the Federal questions, here presented, is further evidenced by the fact that the petitioner filed in that court, and that court granted, an application for stay of mandate to enable petitioner to make this application to the court. Said application appears in Appendix "A", pages 43 through 47; and shows upon its face that it was based upon the asserted denial of petitioner's right to due process of law under the Fourteenth Amendment to the Federal Constitution, by virtue of the Supreme Court of Florida's and the trial court's refusal to quash the information against petitioner and said court's refusal to grant petitioner's motion for change of venue.

On timely application for rehearing, petitioner again invoked the protection of the Fourteenth Amendment. Paragraph 2 A of his petition reads:

> "2 A. The trial court's refusal to quash this omnibus shot-gun information because of the gross misjoinder of parties defendant and offenses therein contained, as well as this court's opinion affirming and upholding said order and conviction violates this petitioner's rights to a fair and impartial trial as guaranteed by Section 12 and due process as guaranteed by Section 12, and the guaranty that a person charged with crime shall be advised of the nature and cause of the accusation against him by Section 11 of the Declaration of Rights of the Florida Constitution, and likewise denies this petitioner due process and equal protection as guaranteed by the Fourteenth Amendment to the Federal Constitution." (R. Vol. X, pp. 1782-1783).

Paragraph 2 C reads:

> "2 C. That said information, the trial court's refusal to quash the same. and this court's opinion "affirming this petitioner's conviction on said in-

formation denies to this petitioner due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the Federal Constitution." (R. Vol. X, pp. 1784-1785).

Paragraph 3 C reads:

"3 C. That the trial court's failure to grant this appellant's application for change of venue and this court's opinion affirming and upholding the trial court's action in so doing and affirming this appellant's conviction without a change of venue, denied this petitioner the right to a fair and impartial trial as guaranteed to him by Section 12 of the Declaration of Rights of the Florida Constitution, as well as denied this petitioner due process of law and equal protection of law as guaranteed to him by the Fourteenth Amendment to the Federal Constitution as well as denying this petitioner the rights and privileges and immunities guaranteed to him by the Fourteenth Amendment to the Federal Constitution." (R. Vol. X, p. 1786).

The Supreme Court of Florida entered order denying petition for rehearing as follows:

"Counsel for Appellant having filed in this cause Petition for Rehearing and having been considered, it is ordered by the Court that said Petition be and the same is hereby denied." (Appendix "A", p. 41).

REASONS FOR GRANTING THE WRIT

As To Question 1

It is clear that the Supreme Court of Florida has decided federal questions. The last paragraph of its opinion expressly states this fact in these words:

"We have considered all other assignments of error and are not persuaded that the trial court committed reversible error in entering the judgment and sentence appealed from."

The information in this case is startling. We have not been able to find a similar charge in any reported decision. We have never before encountered a similar charging document. It presents a question of national importance which has never been decided by this court.

Let us consider Count 1 under which petitioner was sentenced. (R. Vol. I, pp. 1-2). This count charges that petitioner and 4 others set up and promoted and conducted a lottery *in 5 counties*. It then concludes, "contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida." The count then charges one Duskin with a similar violation of the same statute *in 4 counties* without any allegation of conspiracy nor of concert of action nor participation by petitioner with Duskin in his charge; the charge against Duskin concludes in the same words that concluded the charge against petitioner just quoted. The count next charges one Geraldine Berry with a similar violation *in 2 counties* without any allegation of conspiracy nor of concert of action nor participation by petitioner. This charge concludes with the same language.

Count 2 of said information, upon which petitioner was also convicted, follows the same pattern set by Count 1 and contains four distinct and separately concluded charges of violations of the lottery law; each of such four separate charges being concluded as above described, with no allegation of conspiracy nor of concert of action nor participation by petitioner with Dus-

kin, the individual next charged, nor with the 16 other persons next charged, nor with the 2 persons finally charged in said count.

Each of the remaining counts submitted to the jury follows the same pattern and presents the same sort of misjoinder of parties defendant and offenses.

Such an information does not fairly charge this petitioner. As held in the case of *United States v. McConnell,* 285 F. 164 text, 166, there is no authority under the law for joining in one charging document, even in separate counts, charges against different persons, in the absence of "a partnership in criminal purposes," and the court "must look, not to what may be the evidence to support the charge in the indictment, (information) but to the charge itself, and see whether it sets out what Mr. Justice Holmes in *United States v. Kissel,* 218 U. S. 601, aptly terms, 'partnership in criminal purposes.' "

The closest analogy to the instant information we have been able to find in any charging document is found in the first six counts in the case of *State v. Monfred,* et al, 183 Md. 305, 37 A(2d) 913, where Monfred and Caltrider were indicted for violating the statute forbidding the sale and other use of obscene publications. The court said:

> "* * * The first six counts charge that on November 19, 1943, the defendants (1) each unlawfully did sell, (2) each unlawfully did lend, (3) each unlawfully did give away and offer to give away, (4) each unlawfully did show, (5) each unlawfully did have in his possession, and (6) each unlawfully did bring and cause to be brought into the State of Maryland with, intent to sell and exhibit, certain publications alleged to be obscene. * * *"

The court held, as to each of said counts, that the inference from the use of such language is "that each individually committed the offense without concert of action," and that each of those counts charged each defendant, "individually, with a violation of the statute entirely separate and distinct from the offense committed by the other."

The Maryland court cites the *McConnell* case, supra, and like the *McConnell* case, holds that if it appears from the face of the charging document there is a misjoinder of defendants, then the indictment is subject to demurrer (in Florida, a motion to quash).

The instant information more patently charges separate offenses against different persons than the Monfred indictment because it not only concludes as to each group or person, "contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida;" but also because the charge against each individual or group next charged begins with the words, "and that;" and also because each group or individual charged subsequent to petitioner, but in the same count, are alleged to have committed their distinct and separate offenses in various and different numbers of counties.

See also the case of *State v. Nelson,* 8 N. H. Rep. 163, in which the court cites four English cases and one Massachusetts case which we consider to be relative to the same question. The case of *Houchins v. State,* 154 Fla. 277, 17 So(2d) 82, held a charging document fatally defective for misjoinder of offenses, *even in the face of proof that the accused was not actually prejudiced by such misjoinder.*

Philip Lino, named as defendant in the third charge of Count 2 and the second charge of Count 3, was tried with petitioner and convicted (R. Vol. IX, p. 1644).

Agnes Hester Brundidge named in the third charge of Count 2, the second charge of Count 3 and the third charge of Count 4, tried with petitioner, was found guilty (R. Vol. IX, p. 1644).

The underlying philosophy of all the above cases and the due process clause of the Federal Constitution seems to us to be that a fair and impartial trial cannot be had where it is permitted to put the accused on trial when charged in the same document with distinct and separate offenses, or when charged with different individuals with whom he is not charged to be acting in concert, conspiracy or participation.

Even Rule 8 of the Federal Rules of Criminal Procedure, which greatly liberalized pleadings in respect to this question, would not, we believe, permit the instant information to be used against an accused.

As to Question No. 2

The question of whether or not the Fourteenth Amendment to the Federal Constitution protects an accused, in a State court, from trial by newspapers, by requiring the State court to grant a change of venue upon proper application and showing, is one of National scope, vitally affecting the entire Nation, and is one which this court has never expressly decided.

The adverse newspaper campaign to which petitioner was subjected, as shown by Exhibit "A" to the motion for change of venue, is not even disputed and is proven beyond all doubt. That campaign and the talk and gossip generated by it and the sheriff's race, rendered this petitioner odious to the people of Polk County. The prosecution at no place denied that petitioner had been rendered odious. Being odious in that county, the conclusion necessarily follows he could not receive a fair and impartial trial by a jury of that county. The prosecution denied the conclusion but did not deny the facts.

The fact that twenty-six of the jurors were excused because of fixed opinions bolsters the conclusion that petitioner had been rendered odious. Those twenty-six in effect, admitted that the Press campagin had fixed their verdict. The six jurors who tried petitioner did not make this admission but all six of them admitted they had come in contact in one way or another with the vast amount of adverse publicity petitioner had received.

It is impossible to see how anyone who had been subjected to the out-of-court campaign to convict the petitioner, as reflected by Exhibit "A" to his motion for change of venue, could be said to be neutral and impartial between petitioner on the one hand, and the State of Florida on the other hand.

Measured against the case of *Sunderland v. United States,* 19 F(2d) 202, the petitioner could not possibly have received a fair trial. This conclusion seems inescapable under the authority of Mr. Justice Jackson's concurring opinion, joined in by Mr. Justice Frankfurter, in the case of *Shepherd v. State of Florida,* 71 S.

Ct. Rep. 549, wherein it was pointed out that prejudicial influences from outside the courtroom were becoming all too typical of highly publicized trials, and that it rendered a trial but a legal gesture to register the verdict already dictated by the Press and the public opinion which it generated.

See also the cases of *Blackwell v. State,* 76 Fla. 124, 79 So. 731, *Johnson v. State,* 112 Fla. 189, 150 So. 278, and the case of *Juelich v. United States,* 214 F(2d) 950, decided by the Fifth Circuit Court of Appeals on August 12, 1954.

When unsworn, and highly prejudical facts, or purported facts, such as contained in the articles included in Exhibit "A", which include even purported statements of the facts and evidence by witnesses, are brought to the jurors' attention before they take the oath as jurors and when the defendant has no right to cross-examine the alleged makers of such reports, *the defendant is effectively and actually deprived of the right not only to a trial before a fair and impartial jury, but of the right to confront the witnesses against him and the right to cross-examine the same.*

No ordinary man can escape or diminish the power of the Press to fix a reputation for him in the public mind. The Press can make a crusader look like a criminal, a patriot appear to be a traitor and a great man seem to be a demagogue. By stress, slant and focus the Press can make childlike scientists appear to be dangerous risks and a great genius seem simple-minded. When the Press tries, the Press convicts. Where the Press campaign is local, the only hope for the ordinary individual is to have his trial transferred to a place free from the clamor and prosecution of the Press.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for writ of certiorari should be granted.

CRAMPTON HARRIS

1018-19 First National Building,
Birmingham 3, Alabama.

PAT WHITAKER,

308 Tampa Street,
Tampa, Florida

TOM WHITAKER,

308 Tampa Street,
Tampa, Florida

MARK R. HAWES,

308 Tampa Street,
Tampa, Florida

Counsel for Petitioner

PROOF OF SERVICE

I hereby certify that I have mailed, by United States Airmail, postage prepaid, a copy of the foregoing petition to Honorable Richard W. Ervin, Attorney General of the State of Florida, to his office in Tallahassee, Florida, on this the —— day of January, 1956.

Attorney for Petitioner

APPENDIX "A"

Opinion and Judgment of the Supreme Court of Florida

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1955

SPECIAL DIVISION A.

Harlan Blackburn,
Appellant,
-vs-
State of Florida,
Appellee.
} Case No. 26,218

Lawrence Wall and Sing Wall,
Appellants,
-vs-
State of Florida,
Appellee.
} Case No. 26,219

Phillip Lino, Douglas Troutman, and Hattie Eads,
Appellants,
-vs-
State of Florida,
Appellee.
} Case No. 26,220

Opinion filed June 3, 1955

Appeals from the Criminal Court of Record for Polk County, R. H. Amidon, Judge

John R. Parkhill, Whitaker Brothers, Mark R. Hawes and Sam E. Murrell, Sr., for Appellants

Richard W. Ervin, Attorney General, and Bart L. Cohen, Assistant Attorney General, for Appellee.

SEBRING, J.:

Harlan Blackburn and certain other defendants were tried in the Criminal Court of Record of Polk County, Florida, for a violation of the criminal laws. The information upon which the prosecution was based charged the defendants in five separate counts with (1) conspiracy to violate the lottery laws, (2) promoting a lottery, (3) aiding and assisting in the promotion of a lottery, (4) possession of lottery paraphernalia, and (5) selling and offering lottery tickets for sale. During the course of the trial the court withdrew from the consideration of the jury counts 2 to 5, inclusive, and submitted to the jury count 1 charging conspiracy to violate the lottery laws. The jury found Blackburn guilty on the conspiracy count and the court adjudged the defendant guilty on said count and sentenced him to a $500 fine and imprisonment in the county jail for a period of one year.

Subsequently, the county solicitor of Polk County filed a six-count information against Blackburn and certain other defendants, in which Blackburn was charged with (1) promoting a lottery, (2) assisting in setting up a lottery, (3) possession of lottery paraphernalia, (4) sale of lottery tickets, (5) transmitting lottery tickets, and (6) attempting to operate a lottery. Blackburn moved to quash the information on the ground, among others, that the conspiracy count upon which he had previously been convicted related to the identical lottery transaction charged in the second information and that consequently the State was barred, under principles of "former jeopardy and . . . res adjudicata," from prosecuting the defendant for the crimes charged in the second information. The trial court denied the motion to quash and the cause proceeded to trial on the

merits. The jury found the defendant guilty on each count of the information, the trial court pronounced judgment and imposed sentence, and this appeal followed.

The main question on the appeal is whether or not the trial court committed reversible error in refusing to grant the motion to quash on the ground of former jeopardy.

The law is uniform and well established that "punishment for a conspiracy to commit a crime and for the overt act which is the object of the conspiracy does not constitute double punishment," or double jeopardy, even where the substantive offense is the overt act involved in the conspiracy charge. 15 Am. Jur., Criminal Law, section 385, p. 60, 1954 supp., p. 13; 22 C. J. S. 432; anno. 92 L. Ed. 198; U. S. v. Wexler, 79 F. 2d 528; Pinkerton v. U. S., 328 U. S. 640, 66 S. Ct. 1180. The rule rests on the principle that the commission of a substantive crime and a conspiracy to commit the substantive crime are separate and distinct offenses. Brown v. State, 130 Fla. 479, 178 So. 153.

In support of his position that the prosecution under the second information was barred by reason of the former trial and conviction, the appellant cites Williams v. State (Fla.), 69 So. 2d 766, and its companion, Young v. State (Fla.), 69 So. 2d 761, which, he contends, squarely hold that conspiracy to violate the lottery laws is not an independent substantive offense for which a defendant may be prosecuted and punished separately.

In Williams v. State the defendant Williams was tried and convicted in the Criminal Court of Record of Polk County of certain criminal offenses charged in a

six-count information. One count charged the defendant with conspiracy to violate the lottery laws. Section 833.01, Florida Statutes 1951. Two counts charged the defendant with the commission of certain felonies under the lottery law. Section 849.09, subsections 1(a) and (b), Florida Statutes 1951. The remaining counts charged the defendant with the commission of certain misdemeanors under the lottery laws. Section 849.09, subsections 1(g) and (h), Florida Statutes 1951.

On the appeal to this court from the judgment and sentence the holding of this Court was two-fold: (1) "Where a defendant is convicted *under the lottery laws,* section 849.09, F. S., . . . on two or more counts involving both misdemeanors and felonies, only one sentence is applicable" (emphasis supplied); (2) though the Supreme Court of Florida has jurisdiction to review felony convictions, by reason of the provisions contained in section 5, Article V, of the Constitution, it has no power to review misdemeanor convictions, this power being vested in the circuit courts under the provisions of section 11, Article V, of the Constitution; therefore this Court was without jurisdiction to deal with the judgment and sentence appealed from, so far as it pertained to the misdemeanor charges contained in the information "except to order a proper judgment or sentence by reason of the fact that misdemeanors and felonies are charged in different counts of the same information charging variations of only one offense." Nowhere in the opinion was there an adjudication that the count for *conspiracy* to violate the lottery laws, which is an offense only because of the existence of the general conspiracy statute, section 833.01, Florida Statutes 1951, was regarded by this Court as stating a vari-

ation of the substantive lottery violation charged in the other counts of the information, which were punishable only under section 849.09, Florida Statutes 1951.

Under these circumstances, we think it clear that the Williams case cannot be construed as negating or overruling the principle established by an earlier decision of this Court, to the effect that as a general rule a prosecution under the statutes penalizing a conspiracy to violate certain criminal laws of the state constitutes a charge of an independent offense and not merely a variation of the substantive offense which the defendant conspired to commit. Brown V. State, supra.

While it must be conceded that certain language of the opinion in the companion case of Young v. State, supra, tends, at first reading, to sustain appellants' position, such as, for example, the blanket statement that "the information in this case was with reference to *the same criminal transactions,*" it seems clear from a careful consideration of these comments in context that the conspiracy charge was not under consideration at that point of the opinion, as is evidenced by succeeding references in the opinion to the various counts in question as charging commission of acts "embraced within the alternative provisions of the (lottery) statute." p. 762, 763. (Emphasis supplied) And the Court was necessarily governed, in its final conclusions as to the validity of the judgment and sentence before it for review, by the principles of the limited scope of review acknowledged in the Williams case, supra, since the issues involved in the two appeals were precisely the same.

We have considered all other assignments of error and are not persuaded that the trial court committed reversible error in entering the judgment and sentence appealed from.

Affirmed.

DREW, C. J., TERRELL, J., and FLOYD, Associate Justice, CONCUR.

IN THE SUPREME COURT OF FLORIDA:

I, GUYTE P. McCORD, Clerk of the Supreme Court of Florida, do hereby certify that the above and foregoing pages numbered from 1 to 5 inclusive, constitute a true and correct copy of the Opinion and Judgment of the Supreme Court of Florida filed June 3rd, 1955, in that certain cause recently pending in said Court wherein Harlan Blackburn was Appellant and The State of Florida was Appellee, all as the same appears among the records and files of my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of Florida, at Tallahassee, the capital, on this the 3rd day of November, 1955.

/s/ GUYTE P. McCORD

Clerk of the Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA

Case No. 26,218

HARLAN BLACKBURN
Appellant,

vs.

STATE OF FLORIDA
Appellee.

Petition for Rehearing of Appellant Harlan Blackburn

Comes now the appellant, Harlan Blackburn, by his undersigned counsel of record, and respectfully files this, his petition for rehearing in the above entitled cause, and for grounds for said rehearing respectfully shows unto the court as follows:

1.

The court overlooked and wholly failed to consider the gross misjoinder of defendants and offenses in the information against this petitioner, and every count thereof, which misjoinders are as follows:

A. In the first count of the information against this appellant, the solicitor charges that Blackburn and four others set up and promoted and conducted a lottery in five counties, to wit, OSCEOLA, ORANGE, HILLSBOROUGH, DeSOTO and POLK. Without any allegation of any connection between the appellant and one DUSKIN, and without any allegation of any connection between Duskin's lottery and appellant's al-

leged lottery, the information charges, in the same count, that Duskin, alone set up and promoted and conducted a lottery in *four counties,* to wit, Osceola, Orange, Hillsborough and Polk, and then the Information proceeds, in the same count, to charge one GERALDINE BERRY *without any connection being alleged or shown between her and the appellant, and without any connection being shown or alleged between her lottery and appellant's alleged lottery,* with having set up, conducted and promoted a lottery in *two counties,* to wit, Polk County and Hillsborough.

B. The second count of said information first charges this appellant and four others with aiding and assisting in the setting up, promoting and conducting of a lottery as well as being interested in and connected with a lottery in *five counties,* to wit, OSCEOLA, ORANGE, HILLSBOROUGH, DeSOTO and POLK. The Information then proceeds to charge one FRANK DUSKIN alone, with aiding and assisting with the setting up and promoting of a lottery and with being interested in and connected with a lottery in *four counties,* to wit, Polk, Osceola, Hillsborough, Orange, *without any allegation of any connection between Duskin and the appellant or Duskin's lottery and the appellant's alleged lottery.* Immediately following and in the same count the Information then proceeds to charge that one ELOISE BROADMAX and *fifteen others* aided and assisted in the setting up and promoting of a lottery and were interested in and connected with a lottery in *one county,* to wit, POLK COUNTY, and again said information *wholly fails to allege any connection between Eloise Broadmax and the fifteen others and this appellant's alleged lottery or their respective lotteries as charged.* The information then, still in the same count,

charges that *one Geraldine Berry* and *one other* unlawfully aided and assisted in setting up and promoting and conducting a lottery and were interested in and connected with a lottery in *two counties,* to wit, *Hillsborough and Polk,* and again *no allegation is made of any connection shown whatsoever between this appellant and Geraldine Berry and the other person charged with her or Geraldine Berry's lottery and that charged against appellant.*

C. The third count of said information charges first that the appellant and *four others* unlawfully possessed lottery implements and devices and were then and there interested in the conducting of said lottery and possessed said implements for that purpose in *five counties,* to wit, OSCEOLA, ORANGE, HILLSBOROUGH DeSOTO, and POLK, and having concluded the charges against the appellant and *four others,* the Information then proceeds in the same count, *without any allegation of any connection between them and the appellant at all being alleged or the appellant's alleged lottery and theirs, to charge Eloise Broadmax and fifteen others with a similar offense committed in one county alone, to wit, Polk,* then, in the same count, *and without charging any connection whatsoever,* the Information charges *one Frank Duskin* committed a similar offense in *four counties,* to wit, Osceola, Orange, Hillsborough and Polk. Still in the same count, and *without any connection whatsoever being charged between the appellant and one Sam Cagnina and Sam Cagnina's lottery and appellant's alleged lottery,* the Information charges Sam Cagnina with a separate and distinct but similar offense and charges Cagnina committed said offense in *two counties,* to wit, *Hillsborough and Polk.*

D. In count four of said Information it is first charged that this appellant Blackburn and *five others* did unlawfully sell and offer for sale lottery tickets in *five counties,* to wit, *Osceola, Orange, Hillsborough, DeSoto* and *Polk,* and then *without any allegation of any connection between one Geraldine Berry and the appellant, or any connection between Geraldine Berry's lottery and the appellant's alleged lottery,* Geraldine Berry is charged with committing a similar offense in *two counties,* to wit, *Hillsborough* and *Polk;* and then, still in the same count, *and without any allegation of any connection between one Eloise Broadmax and thirteen others and this appellant, and without any allegation of any connection between their lottery and appellant's alleged lottery,* the information charges Eloise Broadmax and the named thirteen others with the sale of lottery tickets in *one County,* to wit, *Polk.*

E. The Fifth count of said information first charges this appellant and five others with unlawfully transmitting lottery tickets and charges this offense was committed in *five counties,* to wit, Osceola, Orange, Hillsborough, DeSoto and Polk, and then, in the same count, and *without any allegation of any connection between one John Henry Speed and this appellant and between John Henry Speed's alleged lottery and appellant's alleged lottery* said information charges that said John Henry Speed, *alone,* committed a similar offense *in Polk County alone,* and then, still in the same count, and *without any allegation of any connection between one Geraldine Berry and her alleged offense and that of this appellant,* said information then charges Geraldine Berry *alone committed a like offense in two counties,* to wit, *Hillsborough and Polk.* And still, in the same count, and *without any allegation of any connection between one Frank Duskin and this appellant or Duskin's alleged*

lottery and this appellant's alleged lottery, the information then proceeds to charge *Frank Duskin alone* committed a similar offense in transmitting lottery tickets in *four counties,* to wit, *Osceola, Orange, Hillsborough* and *Polk.*

2.

A. The trial court's refusal to quash this omnibus shotgun information because of the gross misjoinder of parties defendant and offenses therein contained, as well as this court's opinion affirming and upholding said order and conviction violates this petitioner's rights to a fair and impartial trial as guaranteed by Section 12 and due process as guaranteed by Section 12, and the guaranty that a person charged with crime shall be advised of the nature and cause of the accusation against him by Section 11 of the Declaration of Rights of the Florida Constitution, and likewise denies this petitioner due process and equal protection as guaranteed by the Fourteenth Amendment to the Federal Constitution.

B. This court overlooked and failed to consider the case of *HOUCHINS vs. STATE,* 154 Fla. 277, 17 So. 2nd, 82, wherein this court held as follows:

> "The state admits that the information contains two separate, distinct and unrelated offenses, but says if this be error, it is harmless by Sections 906.25 and 924.33 F. S. 1941, F. S. A. Can it be said that error is not substantial in nature? Was it not an error so fundamental in character as to injuriously affect the rights of the accused? Section 11 of our Declaration of Rights contemplates that an accused shall have certain rights in regard to the accusation against him. Accusation is in the singular. This is a constitutional safeguard

designed, as well as other guarantees therein contained, for the accused's protection. The reason is to prevent a designing prosecutor from including in one information or indictment two unrelated charges and when tried upon one the accused will be prejudiced by the presence of the other charge before the jury. We do not intimate that such was the case here, but our decision when interpreting the law is to guard against not what actually happened but what might happen if such procedure is permitted."

This court likewise failed to consider and apply the case of *UNITED STATES vs McCONNELL,* 285 F. 164, wherein the court held:

" * * * While, under Section 1042 Revised Statute (compiled Statute, Sec. 1690) it is allowable to join in one indictment several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offense which may be properly joined, instead of having several indictments, "there is no authority under the law for joining in one indictment, even in separate counts, such charges against different persons, and, where they are against the same person, each charge must be set out in a different count." * * *

"If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were cooperating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one court, but not even in one indictment. * * * "but we

must look, not to what may be the evidence to support the charge in the indictment, but to the charge itself, and see if it sets out what Mr. Justice Holmes in United States vs. Kissel, 218 U. S. 601, 31 S. Ct. 124, 54 L. Ed. 1168 aptly terms 'a partnership in criminal purposes'."

The court overlooked and wholly failed to consider and apply the case of *State vs. Nelson* 8 N. H. Rep. 163, and *Young v. King* 3 D & E 98 as well as *The King vs. Phillips* 2 Strange 921, where it was held:

"But two persons guilty of two separate and distinct offenses cannot be joined in one indictment because such a joinder might tend to embarass them in their defenses."

"And we are all of the opinion that two distinct and separate offenses cannot be laid in one count of an indictment. Corfew 226, the King vs. Roberts; 2 Burroughs 983, 2 Hawkins, D. C. b2, CH 25 Sec. 89; 4 Modern Rep. 103; 2 Mass. Rep. 163; Commonwealth vs. Simone."

C. That said information, the trial court's refusal to quash the same, and this court's opinion affirming this petitioner's conviction on said information denies to this petitioner due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the Federal Constitution.

D. That the information, the trial court's refusal to quash the same and this Court's opinion affirming this petitioner's conviction, upon said information denies to this petitioner the privileges and immunities guaranteed to him by the Fourteenth Amendment to the Federal Constitution.

3.

A. This court wholly overlooked and failed to consider this appellant's motion for a change of venue, together with supporting affidavits and exhibits, as well as the cases of *Sunderlin vs. United States* 19 Fed. (2d) Series 202, and *Sheppard vs. State of Florida,* 71 Sup. Ct. Rep. 549, *Blackwell vs. State* 76 Fla. 124, 79 So. 731, *Johnson v. State,* 112 Fla. 189, 150 So. 278, and *Jullich v. United States* 214 Fed. Rep. (2) Series 950.

B. That this court overlooked and wholly failed to consider the fact that the six jurors finally selected to try this cause after this appellant had exhausted his challenges and over petitioner's objections were one, Mr. Kirkland, who had heard the case discussed the last two days prior to examination on voir dire; 2, Mr. Rahrar, who had both read of the case and heard it discussed; 3, Mr. Bissitt, who had both read of the case and heard it discussed; 4, Mr. Hilton, who had read of the case; 5, Mr. Mercer, who had read of the case and heard the case discussed, and 6, Mr. Gay, who had read of and heard the case discussed.

C. That the trial court's failure to grant this appellant's application for change of venue and this court's opinion affirming and upholding the trial court's action in so doing and affirming this appellant's conviction without a change of venue, denied this petitioner the right to a fair and impartial trial as guaranteed to him by Section 12 of the Declaration of Rights of the Florida Constitution, as well as denied this petitioner due process of law and equal protection of law as guaranteed to him by the Fourteenth Amendment to the Federal Constitution as well as denying this petitioner

the rights and privileges and immunities guaranteed to him by the Fourteenth Amendment to the Federal Constitution.

4.

This court wholly failed to consider and overlooked the fact that the trial court admitted before the jury illegal, incompetent and highly prejudicial testimony by allowing Frank Duskin, State witness, over this appellant's objections, to testify relative to acts, conversations and transactions allegedly occurring between the said witness Duskin, and appellant, Blackburn, outside of Polk County when no proper foundation or predicate was laid in the information for the admission of such testimony, and in so overlooking and failing to consider the same this court overlooked and failed to apply the doctrines laid down in the cases of *Elliot el al vs. State,* 77 Fla. 581, 82 So. 139, and *Albritton v. State,* 137 Fla. 20, 187 So. 601.

5.

This court overlooked and failed to consider the fact that the trial court admitted in evidence over this appellant's objection the highly incompetent and prejudicial evidence in the form of "the little black book" of the witness Duskin containing the names and addresses of all of the alleged pick-up men and sellers of the appellant, Blackburn, when the record shows that said book was prepared by the witness Duskin and some law enforcement officers, not in the presence or with the knowledge of the appellant, Blackburn, nor even in the presence of some of the alleged writers and when the record further shows that said book was made by

said witness and officers, not in furtherance of the alleged lottery operations of the appellant, but for *evidential purposes.*

In connection with the above this court overlooked and failed to consider and apply the doctrines laid down in the cases of *Jenkins v. State,* 35 Fla. 737, 18 So. 182, *People v. Livermoore,* 60 N. E. (2) 413, *McPhee v. People* 98 p. 2d. 997, *Logan v. U. S.* 12 Sup. Ct. 617, *State v. Coffee* 112 P. (2) 989, as well as 1 *Greenleaf Evidence,* 16th Ed. sec. 184 a.

6.

This court wholly overlooked and failed to consider the fact that the trial court had allowed over this appellant's objections, statements and confessions of the defendant, Phillip Lino and Frank Duskin taken in the office of the Assistant County Solicitor, after the arrest of Lino and Duskin *and made out of the presence of the appellant,* Blackburn and *not in furtherance of any alleged lottery operations of the appellant, Blackburn.*

7.

The Court wholly overlooked and failed to consider the fact that the trial court had, over this appellant's objections allowed in evidence voluminous piles of lottery tickets, in and out sheets and other gambling paraphernalia taken from the persons and homes of many of the defendants, including the state's witnesses, *when no foundation was laid in the information charging any connection between the appellant, Blackburn, and the persons in whose possession said lottery tickets and other gambling paraphernalia were found.*

8.

This court overlooked and failed to consider the fact that the trial court had, over this appellant's objection, allowed in evidence *against appellant confessions of state witnesses, not even charged or on trial with the appellant, Blackburn.*

9.

This court overlooked the fact that the trial court had, over this appellant's timely objections, allowed in evidence the search warrants of the homes and residences and businesses of many of the State's witnesses, *not even charged with or on trial with the appellant, Blackburn.*

10.

This court overlooked and wholly failed to consider the fact that the trial court denied this appellant his requested charge No. 16 to the effect that the State's witness, Frank Duskin, had, by his testimony in this case, gained for himself immunity from punishment for any of the transactions involved in the lottery operation here in controversy, when the record affirmatively shows that the said witness, Duskin, had gained immunity under Sec. 932.29 Fla. Statutes as construed by the case of *State ex rel Mitchell v. Kelly* (Fla. 71 So. 2d, 887). That said State witness, Duskin, had told conflicting stories about this lottery operation and who was in it, therefore, the trial court's refusal to give

said charge deprived this appellant of the right to have the jury consider Duskin's immunity as bearing on the vital issue of the credibility of said witness.

11.

This court wholly overlooked and failed to consider that the trial court, although this appellant was charged as a principal only in this information, *instructed the jury that it was not necessary that the evidence show that the defendant was ever in the county wherein it was charged the offense was committed.* This court overlooking that on page 1620 of the Transcript of Record the following occurred.

"JUROR: Suppose, your Honor, that one of these defendants has never been in Polk County, yet had some connection with it over the county line, can you find him guilty?

"THE COURT: As I said before, you must believe first, that this operation was taking place in Polk County, and that each of these defendants were involved in that operation, were criminally involved in it, which was going on in Polk County.

"JUROR: That he actually had to be in Polk County sometime?

"THE COURT: Not necessarily, no sir, but he would have had to be in it. Now, the person might be conducting a lottery in Polk County and never actually come within the confines of Polk County personally himself.

"JUROR: O. K., that clears it up."

Thus the trial court abolished the distinction between principals and accessories and the injurious effect on appellant's cause is readily apparent, especially in view of the juror's response to the court's instruction, "Juror: O. K. that clears it up."

And in connection with the above this court wholly failed to consider and apply the doctrines laid down in the cases of *Kauz v. State,* 98 Fla. 687, 124 So. 177, *Penny v. State,* 140 Fla. 155, 191, So. 190, *Newmann v. State,* 116 Fla. 98, 156 So. 237, *State v. Mayo* 60 So. 2d 170 and *Albritton v. State,* 32 Fla. 358, 13 So. 955, as well as *Aldridge v. State,* 63 So. 2d 194, wherein this court held:

> "The appellant, Rachel, was jointly charged with Julius and Ted for felonious assault and robbery of Lenart, of which she would have been guilty as a principal in the second degree, if she had been present." * * * the evidence is insufficient to sustain the conviction as a principal and the judgment appealed from is reversed.'

See also the *Penny* case supra, wherein this court said:

> "In the case of Newmann v. State, 116 Fla. 98, 156 So. 237, 239, this court, speaking unanimously through Mr. Chief Justice Davis, had this to say: 'there is under the common law and under our statutes, a clear and marked distinction between a principal * * * and an accessory * * *."

WHEREFORE, appellant respectfully prays that this court will grant him a re-hearing and a re-argument of this cause.

Respectfully submitted,

WHITAKER BROTHERS

By Pat Whitaker

308 Tampa Street, Tampa, Florida

Mark R. Hawes

MARK R. HAWES,

308 Tampa Street, Tampa, Florida

Attorneys for Appellant.

CERTIFICATE OF SERVICE

I, the undersigned, counsel of record for the appellant, Harlan Blackburn, do hereby certify that a copy of the above and foregoing petition for rehearing has been furnished the Attorney General of Florida, by mailing a copy of the same to him at his office in Tallahassee, Florida, this the 8th day of July, 1955.

Pat Whitaker

Denial of Rehearing by Supreme Court of Florida

IN THE SUPREME COURT OF FLORIDA

JUNE TERM A. D. 1955

TUESDAY, NOVEMBER 1, A. D. 1955

HARLAN BLACKBURN
Appellant
-vs-
STATE OF FLORIDA
Appellee

Counsel for Appellant having filed in this cause Petition for Rehearing and having been considered, it is ordered by the Court that said Petition be and the same is hereby denied.

A true copy,

TEST:

Clerk Supreme Court

IN THE SUPREME COURT OF FLORIDA:

I, GUYTE P. McCORD, Clerk of the Supreme Court of Florida, do hereby certify that the attached and foregoing single page constitutes a true and correct copy of the Order of the Supreme Court of Florida entered on November 1st, 1955, in that certain cause wherein Harlan Blackburn is Appellant, and The State of Florida is Appellee, denying Petition for Rehearing in said cause, all as the same appears among the records and files of my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of Florida, at Tallahassee, the capital, on this the 3rd day of November, 1955.

/s/ GUYTE P. McCORD

SEAL

Clerk of the Supreme Court of Florida

IN THE SUPREME COURT OF FLORIDA

HARLAN BLACKBURN,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 26218

PETITION OF HARLAN BLACKBURN, APPELLANT, FOR AN ORDER STAYING THE EXECUTION AND ENFORCEMENT OF THE JUDGMENT OF THE CRIMINAL COURT OF RECORD IN AND FOR POLK COUNTY, FLORIDA, IN THE CAUSE OF THE STATE OF FLORIDA VS. HARLAN BLACKBURN, AND OTHERS, TO ENABLE THE SAID HARLAN BLACKBURN TO APPLY FOR AND OBTAIN A WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES

Your petitioner, Harlan Blackburn, respectfully presents this his application for an order staying the execution and enforcement of the judgment of the Criminal Court of Record of Polk County, Florida, rendered in the above cause on the 4th day of January, 1954, under the provisions of Section 350, Title 28 of the United States Code, to enable said petitioner to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States.

The grounds upon which said petition for certiorari is based are as follows:

1. Because this petitioner was denied a trial as contemplated and guaranteed by Section 12 of the Bill

of Rights of the Florida Constitution, as well as guaranteed by the Fourteenth Amendment to the Federal Constitution.

2. This petitioner was denied equal protection of the law as guaranteed by the Fourteenth Amendment to the Federal Constitution.

3. This petitioner was denied the privileges and immunities guaranteed to him by the Fourteenth Amendment to the Federal Constitution.

4. That this petitioner, by reason of the arbitrary rulings of the trial court, had all of his rights and protections guaranteed by the Fourteenth Amendment of the Federal Constitution frittered away.

5. The trial court's refusal to quash the omnibus and shot-gun information against this petitioner because of the gross misjoinder of parties defendant and offenses therein contained, as well as this court's opinion affirming and upholding said conviction violates this petitioner's rights to a fair and impartial trial as guaranteed by Section 12 of the Declaration of Rights of the Florida Constitution, and likewise denies this petitioner due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the Federal Constitution.

6. That the trial court's failure to grant this appellant's application for change of venue and this court's opinion affirming and upholding the trial court's action in so doing and affirming this appellant's conviction without a change of venue, denied this petitioner the right to a fair and impartial trial as guaranteed to him by Section 12 of the Declaration of Rights of the Florida Constitution, as well as his right under Section

11 of the Declaration of Rights of the Florida Constitution to demand the nature and cause of the accusation against him, as well as denying this petitioner due process and equal protection of the law as guaranteed to him by the Fourteenth Amendment to the Federal Constitution, as well as denying this petitioner the rights and privileges and immunities guaranteed to him by the Fourteenth Amendment to the Federal Constitution.

7. The reasons why this stay is necessary are that unless the same is granted, appellant will, immediately upon the going down of the mandate from this Honorable Court to the said Criminal Court of Record of Polk County, Florida, be taken into custody and said judgment of said court will be immediately effective, the judgment of said court being that this petitioner be incarcerated in the State Prison for a term of five years; and unless said stay is granted this petitioner will be deprived of his liberty under said judgment, which petitioner is attacking and will seek to have quashed and set aside by the Supreme Court of the United States on Certiorari.

8. Petitioner further shows unto the Court that it is his bona fide intention to make proper application to the Supreme Court of the United States for a Writ of Certiorari within the next ninety days, and in support thereof, petitioner attaches professional statement of his counsel, Mark R. Hawes, of Tampa, Florida.

DATED this 9th day of July A. D. 1955.

WHITAKER BROTHERS,
By: P. Whitaker

308 Tampa Street,
Tampa, Florida.

MARK R. HAWES
308 Tampa Street,
Tampa, Florida

ATTORNEYS FOR
PETITIONER.

CERTIFICATE OF SERVICE

I, the undersigned, counsel of record for the appellant, Harlan Blackburn, hereby certify that a copy of the foregoing petition for order for stay of mandate, has been furnished the Attorney General of Florida by mailing a copy of the same to him at his office in Tallahassee, Florida, this the 9th day of July 1955.

Pat Whitaker

I HEREBY CERTIFY that it is the bona fide intention of the appellant, Harlan Blackburn, as well as the undersigned as his attorney, to make application to the Supreme Court of the United States for Writ of Certiorari within the next ninety days, and that I believe that there is merit in this case and that the judgment of the Criminal Court of Record of Polk County, Florida, in the cause of State of Florida vs. Harlan Blackburn (this appellant,) ought to be quashed, reversed and set aside by the Supreme Court of the United States.

MARK R. HAWES

308 Tampa Street
Tampa, Florida

One of attorneys for petitioner.

IN THE SUPREME COURT OF FLORIDA:

I, GUYTE P. McCORD, Clerk of the Supreme Court of Florida, do hereby certify that the above and foregoing four pages constitute a true and correct copy of the Petition of Harlan Blackburn, Appellant, for an Order Staying the Execution and Enforcement of the Judgment of the Criminal Court of Record in and for Polk County, Florida, in the Cause of The State of Florida vs. Harlan Blackburn to Apply for and Obtain a Writ of Certiorari From the Supreme Court of the United States, filed in this Court on November 1st, 1955, in that certain cause wherein Harlan Blackburn is Appellant, and The State of Florida is Appellee, all as the same appears among the records and files of my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of Florida, at Tallahassee, the capital, on this the 3rd day of November, 1955.

Guyte P. McCord

(SEAL)

Clerk of the Supreme Court of Florida.

Stay of Mandate of Supreme Court of Florida

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A D. 1955

THURSDAY, NOVEMBER 3, 1955

HARLAN BLACKBURN,
Appellant,

-vs-

STATE OF FLORIDA
Appellee.

On application of the Appellant, it is ordered that the execution and enforcement of the judgment of this Court rendered June 3rd, 1955 (petition for rehearing denied November 1st, 1955) be and is hereby stayed for ninety days from November 1st, 1955, to enable the Appellant to have a reasonable time in which to apply for and to obtain, if he can, a review of said cause by the Supreme Court of the United States and the Mandate of this Court to the Criminal Court of Record for Pok County to be withheld for said ninety-day period. This order is subject to cancellation at any time if Appellant fails to prosecute this cause to the Supreme Court of the United States within a reasonable time.

WITNESS the Honorable E. HARRIS DREW, Chief Justice of the Supreme Court of Florida, and the Seal of said Court, at Tallahassee, the capital, on this the 3rd day of November, 1955.

/s/ E. Harris Drew,

Chief Justice of the Supreme Court of Florida.

STATE OF FLORIDA
COUNTY OF LEON

I, GUYTE P. McCORD, Clerk of the Supreme Court of Florida, do hereby certify that the signature of E. Harris Drew, Chief Justice of the Supreme Court of Florida, maker of the above order, is the genuine signature of the said Chief Justice; I further certify that he is the duly constituted and acting Chief Justice of the Supreme Court of Florida at the tme said signature was affixed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of Florida at Tallahassee, the capital, on this the 3rd day of November, 1955.

/s/ Guyte P. McCord,

Clerk of the Supreme Court of Florida.

APPENDIX "B"

Florida Lottery Statute

849.09 F. S. A. Lottery prohibited

(1) It shall be unlawful for any person in this state to:

(a) Set up, promote, or conduct any lottery for money or for anything of value; or

(b) Dispose of any money or other property of any kind whatsoever by means of any lottery; or

(c) Conduct any lottery drawing for the distribution of a prize or prizes by lot or chance, or advertise any such lottery scheme or device in any newspaper or by circulars, posters, pamphlets, radio, telegraph, telephone, or otherwise; or

(d) Aid or assist in the setting up, promoting or conducting of any lottery or lottery drawing, whether by writing, printing or in any other manner whatsoever, or be interested in or connected in any way with any lottery or lottery drawing; or

(e) Attempt to operate, conduct or advertise any lottery scheme or device; or

(f) Have in his possession any lottery wheel, implement or device whatsoever for conducting any lottery or scheme for the disposal by lot or chance of anything of value; or

(g) Sell, offer for sale, or transmit, in person or by mail or in any other manner whatsoever, any lottery ticket, coupon, or share, or any share in or fractional part of any lottery ticket, coupon or share, whether such ticket, coupon or share represents an interest in a live lottery not yet played or whether it represents, or has represented, an interest in a lottery that has already been played; or

(h) Have in his possession any lottery ticket, or any evidence of any share or right in any lottery ticket, or in any lottery scheme or device, whether such ticket or evidence of share or right represents an interest in a live lottery not yet played or whether it represents, or has represented, an interest in a lottery that has already been played; or

(i) Aid or assist in the sale, disposal or procurement of any lottery ticket, coupon or share, or any right to any drawing in a lottery; or

(j) Have in his possession any lottery advertisement, circular, poster or pamphlet, or any list or schedule of any lottery prizes, gifts or drawings.

(2) Any person who is convicted of violating any of the provisions of paragraphs (a), (b), (c), (d), of subsection (1) of this section shall be punished by imprisonment in the state prison for not less than one year nor more than five years.

(3) Any person who is convicted of violating any of the provisions of paragraphs (e), (f), (g), or (i) of subsection (1) of this section shall be punished by imprisonment in the county jail for not less than ninety days nor more than one year; provided that any person

who, having been convicted of violating any provision thereof, thereafter violates any provision thereof shall be punished, upon conviction, by imprisonment in the state prison for not less than one year nor more than five years.

(4) Any person who is convicted of violating any of the provisions of paragraphs (h) or (j) of subsection (1) of this section shall be punished by imprisonment in the county jail for not less than ninety days nor more than one year or by fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment; provided, that any person who, having been convicted of violating any provisions thereof, thereafter violates any provisions thereof shall be punished, upon conviction, by imprisonment in the state prison for not less than one year nor more than five years, or by fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment. As amended Laws 1951, c. 26765, Sec. 1.

Florida Change of Venue Statute

53.03 F. S. A. Change of venue; application, affidavits, etc.

In the event either party to cause desires a change of venue he shall make application therefor on oath stating that he fears he will not receive a fair trial in the court where the suit is pending (1) on account of the adverse party having an undue influence over the minds of the inhabitants of the county, or justice district, (2) or on account of applicant being so odious to the inhabitants of the county, or justice district, that he could not receive a fair trial.

Such application shall be filed not less than ten days before the beginning of the term of the court, or good cause shown for failure to so file same within such time, and shall fully and distinctly set forth the facts upon which the application for a change of venue is founded, and the same shall be accompanied by a certificate of counsel of record that such affidavit and application is made in good faith; said application shall also be supported by affidavits as to the facts stated in application by at least two reputable citizens of the county or justice district not of kin to defendant nor to counsel for the defendant."

911.02 Removal of cause

* * *

(2) In all criminal cases pending in any of the criminal courts of record in any county in this state, changes of venue may be had and granted upon the same terms and for the same reasons and grounds in the same manner as is now provided by law for changes of venue in causes pending in the circuit courts. * * *